CASE NOTE

ROBINSON v. THE WESTERN AUSTRALIAN MUSEUM[1]

Constitutional law — Legislative power of a State — Applicability of Imperial legislation — The Seas and Submerged Lands Act 1973 (Cth) — Navigation Act 1912 (Cth) —Locus standi.

A number of issues, "constitutional" and otherwise, arose in the consideration of this case by the High Court. Perhaps the area that will be regarded as being of most general importance will be that of *locus standi*, although the discussion of the limits of the legislative power of the State of Western Australia will also be of interest.

Robinson, a citizen of Western Australia, located the remains of the Dutch ship the "Gilt Dragon" which sank in about 1656 on the sea-bed north of Perth and within three miles of the Western Australian coast. In 1957 he gave notice of his discovery to the Commonwealth Receiver of Wrecks in Freemantle and claimed an interest as finder. He gave such a notice again in 1963, having been unable to relocate the wreck in the intervening years. These notices were given pursuant to the Navigation Act 1912 (Cth) ("the Navigation Act"). Robinson recovered various artefacts (including coins) from the wreck and submitted some to the Receiver and some to the Western Australian Museum Board, a statutory body established by the Museum Act 1959 (W.A.).

By a series of enactments, including the Museum Act Amendment Act 1964 (W.A.),[2] the Museum Act 1969 (W.A.) and the Maritime Archaeology Act 1973 (W.A.) ("the Maritime Archaeology Act"), the Western Australian legislature purported to vest property in historic wrecks, including the "Gilt Dragon", and in relics associated with such wrecks in the Western Australian Museum, the defendant, on behalf of the Crown. Section 6 of the last-named Act went further and vested property in "maritime archaeology sites"[3] in the Museum. It became an offence to alter or remove a ship or a site.[4] No compensation was payable as a result of this vesting. In pursuance of its powers the Museum prevented the plaintiff from working on the wreck or taking away or salvaging relics. It itself recovered items, which it retained, and no compensation or reimbursement for his expenses was offered to the plaintiff.

In 1974 Robinson commenced proceedings for declarations that the various State Acts were invalid on one or more of three grounds:

(i) that they were beyond the legislative power of the State;

(ii) that they were repugnant to the Imperial Merchant Shipping Act 1894; and

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[1] (1978) 16 A.L.R. 623; (1977) 51 A.L.J.R. 806. High Court of Australia; Barwick C.J., Gibbs, Stephen, Mason, Jacobs and Murphy JJ.

[2] The principal Act therefore became the Museum Act 1959-1964.

[3] Defined in s. 4 of that Act so as to include parts of the sea-bed.

[4] S. 7(2) of the Maritime Archaeology Act.

(iii) that they were inconsistent with the Navigation Act and the Seas and Submerged Lands Act 1973 (Cth) ("the Seas and Submerged Lands Act").

He also sought a declaration that the Museum's retention of relics was not lawful, and certain injunctions. The defendant demurred on the grounds that the facts as pleaded disclosed no cause of action, that the plaintiff had no standing to sue and that the legislation was valid. The Commonwealth (in support of the plaintiff) and various States (in support of the defendant) intervened by leave.

Standing

There are a multiplicity of tests as to whether a plaintiff has standing in an action in which he seeks a declaration. These range from a stern insistence that he have "private rights" in the matter in dispute to asking whether the plaintiff is "more particularly affected than other people".[5] In recent years, perhaps, the latter and apparently less restrictive test has gained in currency. In this case, where the matter came to trial on a demurrer, there was no "evidence" on which the court could base its decision. It therefore had to assume that the facts pleaded were true and base its decision on those facts, without the benefit of a hearing which might have clarified the issues. A particular result of this was that, in the view of most of the court, it was not possible to form a final view on the nature of the plaintiff's rights with respect to the wreck. Despite this, and with one dissenting voice,[6] the court found that the plaintiff had standing to maintain his suit.

Barwick C.J. disposed briefly of the question of standing. He said that the plaintiff had located (and relocated) the wreck and had done acts in possession of it.[7] Consequently he was in a position to make a credible claim for rights of salvage and this fact took him out of the class of members of the public generally. The judgment of Jacobs J. reveals a basically similar approach, although he considered the plaintiff's claim to salvage at more length.[8]

Stephen and Mason JJ. dealt with the question of whether the plaintiff had a sustainable claim for salvage at some length. Mason J. concluded that he had a claim that could be litigated and that he could fit within the test for standing that he formulated as follows:

> the plaintiff must be able to show that he will derive some benefit or advantage over and above that to be derived by the ordinary citizen if the litigation ends in his favour.[9]

His Honour felt that, whilst the plaintiff may have had an alternative remedy open to him, this only went to whether the court should exercise its discretion to make a declaration, rather than to the question of standing. Stephen J., however, concluded that the plaintiff had disclosed on the pleadings no claim to salvage in the wreck and that as

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[5] *Anderson* v. *The Commonwealth* (1932) 47 C.L.R. 50, 52.
[6] That of Stephen J.
[7] (1978) 16 A.L.R. 623, 633.
[8] *Id.* 672-673.
[9] *Id.* 661.

the legislation did not affect the relics he took from the wreck before it commenced its operation, the plaintiff had no claim which could give him standing. He therefore allowed the demurrer and did not consider the other issues before the court.[10]

A similar attitude to that taken by Mason J. was taken by Gibbs J.[11] He said that as Robinson's claim to the wreck was more than merely colourable the questions arising out of it should be considered. He had a further ground for his conclusion that the plaintiff had standing. Before the enactment of the legislation Robinson was working on the wreck. The legislation made it an offence for him to continue to do so. This gave him a right to challenge it.[12] A further comment made by his Honour may be cited in future. He said that the court has a discretion to hear matter where standing is in dispute and that in exercising that discretion it is appropriate to take into consideration the fact that the Commonwealth and various States had intervened to argue the case.

If the Chief Justice was able to deal with the question of standing "briefly", Murphy J. was able to do so even more briefly. He relied upon the following statement of the United States Supreme Court in *Baker* v. *Carr*:

> The gist of the question of standing [is whether the plaintiff has] alleged such a personal stake in the outcome of the controversy as to ensure that the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.[13]

It is not clear that this test is any easier to apply than the more traditional formulations. Indeed, it is not clear what the test means in practical terms. Moreover, to a significant degree, it goes against one of the major reasons for the traditional common law court's reasons for requiring a plaintiff to have some personal interest in the outcome—the desire to resolve practical, rather than "academic or hypothetical", questions[14]—insofar as it emphasises that interest as an aid to problem solving rather than as the reason for the embarkation on the problem solving process. In the event, his Honour found that the plaintiff had standing.

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[10] *Id.* 650-660. In so doing his Honour was aware that this judgment might be seen as going off on a technicality. He felt, however, that in this case the matters he had discussed went to the root of the plaintiff's claim. Nonetheless, it does seem a pity that he could not have devoted more attention to the other issues before the court in view of the very even division of the court in relation to them. One point in his Honour's judgment that may interest some is his discussion of some of the most delightfully named cases in the common law, including *The King* v. *Forty-Nine Casks of Brandy* (1836) 3 Hagg. 257, 166 E.R. 401.

[11] (1978) 16 A.L.R. 623, 641-642.

[12] It is submitted that this point is not as strong as the first. It would seem to allow anyone to challenge any criminal statute if he can prove that he has, at some stage before the legislation came into force, done those acts that subsequently constitute an offence and that he would like to do them again. It would appear that this sort of consideration was in the mind of Stephen J. when he held that there was no standing.

[13] (1978) 16 A.L.R. 623, 675. *Baker* v. *Carr* (1961) 369 U.S. 186, 204.

[14] *Id.* 661 *per* Mason J.

The Competence of the Western Australian Legislature

The first ground of attack on the validity of the Acts that were under challenge was that they were beyond the legislative competence of the State Parliament. It was not disputed by the defendant that the sea-bed on which the "Gilt Dragon" rested was not part of the State of Western Australia.[15] The question to be decided was therefore whether there was a sufficient connection between the subject matter of the various Acts and the interests of the State to allow the legislature the power to endow them with an extra-territorial operation. In other words, were they for the peace, order and good government of the State?[16] On this question the court divided evenly.

Gibbs and Mason JJ. were of the opinion that Western Australia had legislative competence. Gibbs J. relied on his judgment in the case of *Pearce* v. *Florenca*[17] to decide that where the persons, things or events to which the legislation applied "occurred" within the State's off-shore territorial waters there was power to make laws with respect to those persons, things or events. His Honour also stated that the wreck of the "Gilt Dragon" is part of the history of Western Australia, that the sailors who were her crew played a part in the States history and that the preservation and display of the relics was therefore of legitimate concern to the people of the State. If a third ground was needed to sustain the legislative power, his Honour would have found it in the need to regulate rights and maintain order in areas so close to the territory of the State.[18] Mason J. simply stated that there was a sufficient connection between the legislation and the peace, order and good government of the State, evidently relying on the analogy with the power over fisheries and on the fact that the Act was designed to preserve the relics "for the benefit of the State and its citizens".[19] A final item in support of the competence of the legislature is to be found in the judgment of Stephen J. who, although he did not need to make a decision on the point, said, in relation to the issue of competence that "as at present advised, I would in any event be disposed to determine in the defendant's favour".[20]

Two of the remaining members of the court disagreed. Barwick C.J. found the defendant's endeavour to show that the legislation was for the peace, order and good government of the State "completely unconvincing". The Dutch ship was not intent upon, or instrumental, in discovering Australia. The wrecks were not historic, indeed:

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[15] *Cf.* the *Seas and Submerged Lands Act* case (*New South Wales* v. *The Commonwealth* (1975) 8 A.L.R. 1).

[16] The principal case in this area is the Privy Council decision of *Croft* v. *Dunphy* [1933] A.C. 156. This was an appeal from a Canadian court but the principles are of general application.

[17] (1976) 9 A.L.R. 289.

[18] (1978) 16 A.L.R. 623, 643. This reasoning would not extend to making laws with respect to neighbouring States as there would be no legislative vacuum there as there is with the sea-bed in the absence of Commonwealth legislation.

[19] *Id.* 664.

[20] *Id.* 660.

> Cook's cannon has . . . more relationship to the history of the Australian colonies than did the activities of the Dutch East India Company and the voyages and disasters of its fleet.[21]

Moreover, whilst the establishment and maintenance of the Western Australian Museum was a matter for the peace, order and good government of the State, giving it property in sites or wrecks off the coast went much further than the promotion of a museum, and was not.[22] Of the other members of the court Murphy J. (who felt that the ownership of the remains of the wreck was incidental to national sovereignty) simply asserted that there was no legislative competence[23] and Jacobs J., who did not need to decide this issue, did not pass upon it.

One matter does arise clearly out of this case in relation to legislative competence. The Commonwealth Solicitor-General apparently argued that no State could pass a law dealing with the sea-bed below its low-water mark. Mason J. explicitly rejected this contention[24] and, in view of their comments, it is evident that Gibbs and Stephen JJ. would also have done so. The remarks of the Chief Justice show that he did not subscribe to such a proposition (if he had, those remarks would not have been necessary) and there is nothing in the judgment of Murphy J. to support it. Whilst some assistance for the proposition put forward by the Commonwealth might be gleaned from comments of Jacobs J. in a slightly different context,[25] it is submitted that it is now clear that there is no absolute bar to State legislation relating to the sea-bed within three miles of the State's low-water mark.[26]

The Merchant Shipping Act

The plaintiff argued that the various Western Australian Acts were inconsistent with certain provisions of the Merchant Shipping Act. The sections in question vested property in unclaimed wrecks in "Her Majesty's dominions" in the Crown.[27] The question for consideration was therefore whether these sections operated to prevent the Western Australian legislature making laws that dealt with such wrecks. Two justices[28] also considered whether the Merchant Shipping Act was

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[21] *Id.* 636.

[22] *Ibid.* The Chief Justice did not consider the third point raised by Gibbs J. If, as this case suggests (see *infra*), the States have some legislative power with respect to the sea-bed, would it not be correct to say that the preservation of order would be one topic that would allow a degree of regulation?

[23] *Id.* 675.

[24] *Id.* 664.

[25] *Id.* 672. In fact, his Honour's comments probably only relate to State legislation dealing with "dominion", a term that he does not define.

[26] *E.g.* most laws dealing with the preservation of order should be valid in the absence of inconsistency with Commonwealth legislation.

[27] S. 523. In fact, this was the only one of the sections of the Merchant Shipping Act dealing with wrecks that the court regarded as having any potential operation in Australian waters. One matter in this context that was not referred to by the court was that s. 523 did not create a new legal right in the Crown. It confirmed an existing one.

[28] Murphy J. who concluded that it did not at all and Mason J. who concluded that none of the provisions relating to wrecks would apply. In both cases these

capable of operating in Australian waters. Four members of the court decided the primary question and three separate reasons were given for reaching the answer "no".

Gibbs J. was prepared to assume that the section he saw as crucial, section 523, operated in Australia to vest property in wrecks in the "Crown". However, the "Crown" referred to must be taken to mean the Crown in right of Western Australia. That Crown had a right to dispose of its property and had done so (by the challenged legislation).[29] An alternative approach was taken by Mason J. His Honour referred to the *Seas and Submerged Lands* case to support the contention that the bed of the sea beyond the low-water mark had never been part of the State of Western Australia and never part of the Queen's dominions. Consequently, the relevant provisions of the Merchant Shipping Act did not apply and there could be no question arising as to inconsistency with the various State Acts.[30] A third approach was taken by Jacobs J. who said that the various provisions of the Navigation Act are analogous to those of the Merchant Shipping Act under discussion. He held that the former took precedence over the latter in these circumstances.[31] The legal reasoning that his Honour adopted to lead himself to this conclusion is not clear. If he is saying that the two acts are inconsistent and that therefore the 1912 Commonwealth Act takes precedence over an earlier Imperial Act of general application, it is respectfully submitted that he is wrong. It is true that after the commencement of the Statute of Westminster Adoption Act 1942 (Cth) the Commonwealth could make laws repugnant to and taking precedence over Imperial laws. However, it would appear that before that commencement it could not do so.[32] Moreover, section 2 of the Statute of Westminster only saves "colonial" legislation passed after the date from which that section operates.[33] Consequently, if parts of the Navigation Act are inconsistent with provisions of the Merchant Shipping Act, it is likely that those parts are bad and never became law. Of course, his Honour may simply have been using an argument

conclusions were the major premise in their decisions that s. 523 did not apply in this case.

[29] (1978) 16 A.L.R. 623, 646-647. His Honour does not explain why it should be the Crown in right of Western Australia rather than the Crown in right of the Commonwealth. One possible reason is that the Commonwealth did not exist when s. 523 was enacted whilst Western Australia did. This, however, comes up against the difficulty that the prerogative right pre-dates the State of Western Australia (n. 27 *supra*).

[30] *Id.* 665.

[31] *Id.* 672-673. In fact, his Honour does not actually state this but it appears a necessary consequence of the way his judgment is set out in that once he says that the Navigation Act has similar provisions in Australia he simply goes on to discuss the consistency of the Navigation Act and the State legislation.

[32] Colonial Laws Validity Act 1865, s. 2 (Imp.). This matter was dealt with in the case *Union Steamship Company of New Zealand Ltd* v. *The Commonwealth* (1925) 36 C.L.R. 130. For a general discussion of the applicability of the Colonial Laws Validity Act see Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) 61-65.

[33] In Australia this was 3 September 1939.

similar to that used by Gibbs J., and saying that the Navigation Act merely deals with property that vests in the Crown pursuant to the Merchant Shipping Act or otherwise.

Whichever of the above interpretations can properly be drawn from the judgment of Jacobs J., Murphy J. quite clearly used the first argument and held that section 523 of the Merchant Shipping Act was in conflict with the Navigation Act and was consequently invalid in Australian law.[34] As discussed above, this view is probably wrong. It evidently flows from an extension of his Honour's argument in *Bistricic* v. *Rokov*[35] (where he held that amendments to the Merchant Shipping Act passed by the United Kingdom legislature in the 1950s could not affect the law applicable in the Australian States). The imperial Act was part of the law governing a unified imperial colonial system and Australia was no longer part of that system so that the Act was now "inapplicable". However, even if that is true, it was not the case in 1912 and it is difficult to see how, in this area of law, a change in circumstances could resurrect a previously invalid law. His Honour also held that the section of the Merchant Shipping Act being dealt with was inconsistent with the Seas and Submerged Lands Act and had no effect in Australia. Unfortunately, he gave no reasons for this finding. Indeed, his judgment as a whole appears again to be, in the words of Professor Howard, "a short statement of dogmatic conclusions unsupported by reasoning".[36]

Inconsistency with Commonwealth Legislation

The final constitutional issue raised in the case was whether the various State Acts, or part of them, were inconsistent with the Navigation Act or the Seas and Submerged Lands Act. If they were inconsistent they were, by virtue of section 109 of the Constitution, invalid to the extent of the inconsistency. As if to add to the general difficulty in interpreting this case, two justices did not pass upon this issue, two found no inconsistency (subject to a slight qualification because of the judgment of Mason J.) and two held that the challenged Western Australian legislation was inconsistent with the Commonwealth legislation.

There are two parts of the generally accepted test for inconsistency. The first is that the legislation will be inconsistent if the provisions of the respective State and Commonwealth laws are incapable of being simultaneously obeyed. The second is that they will be inconsistent if one shows that it is intended "completely, exhaustively or exclusively" to govern the field in which it operates and with respect to which the other applies.[37]

Gibbs and Mason JJ. could find no inconsistency between the challenged legislation and the Navigation Act. They both reviewed the

[34] (1978) 16 A.L.R. 623, 674.
[35] (1976) 11 A.L.R. 129, 139.
[36] (1977) 11 Melbourne University Law Review 128.
[37] *Ex parte McLean* (1930) 43 C.L.R. 472.

latter and held that whilst some of its provisions would affect the wreck of the "Gilt Dragon", none of them affected the vesting of property in it. There was therefore no provisions incapable of simultaneous obedience. Further, in their views, there was no intention shown that the Commonwealth intended to govern the field dealt with in the Western Australian legislation.[38] Jacobs J. noted that the relevant provisions of the Navigation Act were such that if no "owner" established a claim to the wreck the Receiver of Wrecks should sell it, pay the salvor an appropriate amount and pay the balance into Commonwealth funds. His Honour felt that these provisions laid down procedures and gave rights to various persons and to the Commonwealth which were not consistent with the State legislation.[39] Murphy J. asserted that there was an inconsistency without going into any reasoning.[40]

On the question of the operation of the Seas and Submerged Lands Act, the crucial consideration was whether the fact that the Act vested sovereign rights in the Commonwealth with respect to the sea-bed on which the "Gilt Dragon" was lying prevented the State from legislating to dispose of the property in the wreck. Section 16(b) of the lastnamed Act saved all State laws except those that were expressed to "vest or make exercisable any sovereignty or sovereign rights" in the sea-bed. The Act did not define sovereignty or list the sovereign rights referred to.

Gibbs J. took the view that the purpose of section 16(b) is to save all State Acts save those that expressly assert sovereignty contrary to the Commonwealth's claim. He then cited *Pearce* v. *Florenca*[41] to show that a State law can still operate to allow confiscation of property of people in off-shore waters where the Commonwealth has sovereignty. The implication that he made was that the fact that a State law operates to effect an entitlement to property is not in itself an assertion of sovereignty or sovereign rights. There was therefore no inconsistency in relation to the provisions that dealt with property in the wreck. Moreover, he was not prepared to recognize a distinction between personal and real property in this context so that he held that part of the Maritime Archaeology Act that dealt with maritime archaeological sites to be also valid.[42] In the former, but not in the latter, view he was followed by Mason J. His Honour was clear that the Seas and Submerged Lands Act did not vest any proprietary rights in the sea-bed in the Commonwealth. He could see no inconsistency between that Act and the parts of the Western Australian legislation that related to property in wrecks. However, the same was not the case with maritime archaeology sites that were actually part of the sea-bed. He held that the sea-bed cannot be conveyed by State legislation.[43] Jacobs J. extended

[38] (1978) 16 A.L.R. 623 Gibbs J. 649; Mason J. 668-669. Gibbs J. relied on *Victoria* v. *The Commonwealth* (1937) 58 C.L.R. 618 in which the High Court could find no inconsistency between Victorian and Commonwealth legislation that dealt with the removal of wrecks on or near the coast.

[39] *Id.* 673.

[40] *Id.* 674.

[41] (1976) 9 A.L.R. 289.

[42] (1978) 16 A.L.R. 623, 644-646.

[43] *Id.* 669.

this last point. He held that dominion was an incident of sovereignty and that where the wreck of a ship was in the area covered by the Seas and Submerged Lands Act to deal with it is to affect dominion and deny the sovereignty of the Commonwealth. Therefore that part of the challenged legislation that related to vesting property in wrecks or sites was invalid.[44] Murphy J. simply stated that the relevant State provisions were invalid.[45]

It would appear that the approach adopted by Gibbs and Mason JJ. as to inconsistency is more in keeping with the authority on that area than is that of Jacobs J. (and presumably Murphy J.). Their Honours are evidently concerned to apply strictly the tests that have been developed. In particular, they were concerned not to read too widely the provisions of the Seas and Submerged Lands Act which, in view of the saving nature of section 16(b), seems to give effect to the intention of the legislature. In the absence of authority as to the meaning of the word "sovereignty" they were clearly not prepared to hold that simply because a State law dealt with property rights it was claiming sovereignty.[46]

Conclusion

In the event, Barwick C.J. and Jacobs and Murphy JJ. indicated that the demurrer should be overruled so that there was a statutory majority (because of the Chief Justice's casting vote) over the dissent of Gibbs, Stephen and Mason JJ. Much of the discussion can already be regarded as academic because the Commonwealth has now legislated to cover much of the matters dealt with in the State Acts by its Historic Shipwrecks Act 1976 (which was passed after this action commenced).

The interest that remains in the case is to be found in the ways that the various judges approached it. Attention has already been drawn to significance of the discussion of locus standi and the powers of a State legislature. The approach to the question of inconsistency illustrates certain divisions and perhaps presages some more definitive discussion of this area of constitutional law in the future. No doubt we will also soon see another judge take up Murphy J.'s provocative comments as to the nature of the relationship between Australia and the United Kingdom. The case might also be seen by some as illustrating, in the composition of the majority and the minority (notwithstanding the concurrence of Barwick C.J. and Murphy J.), some of the ideological influences at work in determining the decisions of the present High Court.

ALLAN MURRAY—JONES*

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[44] *Id.* 672.

[45] *Id.* 674.

[46] No member of the court dealt specifically with the question of what "sovereignty" entails.

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